INTERPRETING TITLE VII: THE DISCORD BETWEEN LEGISPRUDENCE AND JURISPRUDENCE AND ITS IMPACT ON SMALL BUSINESSES

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I. INTRODUCTION

Congress and the United States Supreme Court have engaged in a discordant "call and response" form of communication that often pits congressional intent against judicial interpretation.[1] In the civil rights arena, Congress has been particularly willing to abrogate the Court's jurisprudence when judicial decisions are unpopular with a large majority of the American public.[2] At the same time, the Roberts Court has maintained a stalwart skepticism towards Congress' civil rights legisprudence.[3]

This dysfunctional relationship is best highlighted when the Court interprets the landmark Civil Rights Act of 1964 (Civil Rights Act) and its section prohibiting workplace discrimination, Title VII. Most recently, the Court decided two Title VII cases during its 2012 October Term with enormous implications for employer liability. In the first case, *Vance v. Ball State University*, the Court held that an employee is a "supervisor" for vicarious liability purposes only if the employer authorized the individual to take tangible employment actions against the victim.[4] In the second case, *University of Texas Southwestern Medical Center v. Nassar*, the Court held that an employer is only liable for retaliation against an employee if discrimination was the but-for cause of the employee's termination.[5] Both

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[1] *See* William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 394–96 (1998) (discussing the strained relationship between Congress and the Court).

[2] *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e) (2012).

[3] "Legisprudence" is a relatively new term used in academia that analyzes how Congress accounts for judicial interpretation and existing legal frameworks when considering a bill. *Editors' Note on "Legisprudence"*, B.U. L. REV. 423, 424 (2009).

[4] 133 S. Ct. 2434, 2439 (2013).

[5] 133 S. Ct. 2517, 2534 (2013).

cases, decided along partisan lines with Justice Anthony Kennedy providing the deciding vote each time, narrow the scope of protection afforded to employees. Focusing on employees' diminished workplace rights, Justice Ruth Bader Ginsburg penned two scathing dissents calling on Congress to "correct" the Court's interpretation through subsequent legislation.[6]

Given Congress' track record in overturning the Court's civil rights jurisprudence, Congress may very well listen to Ginsburg's pleas. When Congress takes such action, though, it often overlooks a critical sector of the American economy: the small business community. Because of their insular positions in the capital markets and difficulties allocating resources to combat discrimination charges, small businesses are affected by the discord between Congress' and the Court's relationship to a much greater extent than large corporations.

This Comment focuses solely on the collateral impact the discord between Congress' legisprudence and the Court's jurisprudence creates on small businesses; it does not weigh the merits of whether Congress should abrogate the Court's decisions. Part II lays the foundation of Title VII's legisprudence while Part III summarizes Title VII's jurisprudence. Part IV discusses the Court's recent *Vance* and *Nassar* decisions in-depth, including Ginsburg's dual dissents. Next, Part V analyzes the implications the rulings will have on the small business community, concluding that the decisions will ultimately benefit small business entrepreneurs. Part VI then offers advice to small business general counsel and outside counsel with small business clients (collectively, "small business counsel") who must apply these rulings to employer workplace policies. Part VII concludes.

II. TITLE VII'S PASSAGE AND RELEVANT PROVISIONS

A. *The Civil Rights Act of 1964*

After the Supreme Court's decision in *Brown v. Board of Education*,[7] civil rights advocates like Dr. Martin Luther King, Jr. pushed for greater liberties that would prohibit discrimination outside of the public school context.[8] As race relations deteriorated during the 1960s, President John F. Kennedy announced that he would send a sweeping civil rights reform bill to Congress.[9] Skeptics believed the bill would reach the same

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[6] *Vance*, 133 S. Ct. at 2455 (Ginsburg, J., dissenting); *Nassar*, 133 S. Ct. at 2534 (Ginsburg, J., dissenting).

[7] 347 U.S. 483 (1954).

[8] WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2–3 (4th ed. 2007) (chronicling the tribulations of the Civil Rights Movement).

[9] *Id.* at 3. Kennedy stated, "The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated." *Id.*

demise earlier civil rights bills had experienced: in 1957, a Senate filibuster had blocked the passage of similar civil rights legislation while Senate Democrats in 1960 largely defanged a bill by successfully deleting provisions regarding education, employment and housing equality.[10]

After President Kennedy's assassination, though, and an ensuing legislative battle,[11] the 1964 incarnation of the Civil Rights Act passed through both Houses of Congress and was signed into law by President Lyndon B. Johnson on July 2, 1964.[12] The landmark act outlawed, among other practices, unequal application of voter registration requirements, discrimination in public accommodations and discrimination in the workplace.[13] This last provision, known as Title VII, created the Equal Employment Opportunity Commission (EEOC)[14] to enforce the prohibitions on workplace harassment through "conference, conciliation and persuasion."[15] Importantly, Title VII would not have been passed without the support of legislators from both chambers who were wary of federal regulation in private business.[16] As a result, management prerogatives were left largely undisturbed as a price for their support.[17]

B. *Title VII's Relevant Provisions*

Title VII makes it unlawful "for an employer . . . to discriminate against any individual with respect to his . . . employment, because of such individual's race, color, religion, sex, or national origin."[18] An "employer" is anyone who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[19] Title VII contains two antidiscrimination provisions. The first provision relates to status-based discrimination, which prohibits an employer from discriminating against a protected class in the form of demotion, termination, salary reduction and the like.[20] The second provision involves remedy-based discrimination, which prohibits an employer from retaliating against an employee who has opposed, complained of or sought remedies regarding workplace discrimination.[21]

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[10] *Id.* at 4.
[11] *See id.* at 38 (discussing the unorthodox manner in which the Civil Rights Act was passed).
[12] *Id.*
[13] *Id.*
[14] *See* 42 U.S.C. § 2000e-4 (2012) (outlining the EEOC's creation and composition).
[15] *Id.* § 2000e-5(b) (outlining the EEOC's enforcement responsibilities).
[16] H.R. REP. NO. 88-914, at 29 (1963).
[17] *Id.*
[18] 42 U.S.C. § 2000e-2(a)(1).
[19] *Id.* § 2000e(b).
[20] *See id.* § 2000e-2(a).
[21] *See id.* § 2000e-3(a).

The provision pertaining to status-based discrimination was enacted as part of the Civil Rights Act of 1991 (1991 Act), which sought to revise parts of several federal antidiscrimination statutes.[22] The amendments were meant to bolster the Civil Rights Act's original scope and to respond to several decisions by the Court that many in Congress believed sharply curtailed the effectiveness of antidiscrimination laws.[23] However, Congress for some reason failed to amend Title VII's remedy-based discrimination provision.

Furthermore, despite Title VII's specific textual provisions, it does not define key terms such as "discrimination" and "hostile work environment."[24] Some of these lexicological gaps were intentionally left to the courts and the EEOC to define.[25] In crafting workable definitions for these terms, courts eventually applied agency theories of liability.[26]

III. TITLE VII'S JURISPRUDENCE

A. *Courts' Early Interpretations and Evolving Theories of Liability*

Courts struggled to interpret the scope of Title VII after its enactment, and its shifting theories of liability can be separated into three distinct eras: the 1960s, the 1970s and the 1980s to present. As courts tried to import modern theories of agency law into the Title VII arena, though, their interpretations often raised more questions than they answered. A brief summary of these periods will help frame the discussion of how the Court has come to view employer liability today.

1. *Courts in the 1960s Focused on Corporate Policies*

Initially, Title VII litigants challenged corporate policies that were either facially discriminatory or facially neutral which nevertheless produced a disparate impact.[27] Overall, very few Title VII plaintiffs alleged discrimination by an employer's agent.[28] Court interpretations began to arrange themselves along a spectrum almost immediately. Some circuit

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[22] *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991).
[23] H.R. REP. NO. 102-40, pt. 2, at 2–4 (1991) (Conf. Rep.) (citing, among others, Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989) (holding that an alleged disparate impact caused by a seniority system requires a showing of discriminatory intent) and Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (holding that employers do not have to justify racial disparity by proving business necessity)).
[24] *See generally* 42 U.S.C. § 2000e.
[25] Courts have generally defined "discrimination" to mean any action that produces direct economic harm, such as terminating, demoting or reducing an individual's salary on account of that employee's protected status. *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2440 (2013).
[26] *Cf.* Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 774 (2010).
[27] *Id.*
[28] *Id.* at 777.

courts interpreted Title VII's antidiscrimination mandate broadly to hold employers liable for practices that also produced indirect economic consequences, such as corporate policies that tolerated hostile work environments.[29] Others began to hold employers liable for hostile workplaces if they knew or reasonably should have known about employee harassment but failed to act.[30] Generally, though, the circuit courts applied a negligence theory of liability.[31] Their decisions rarely discussed strict and vicarious liability.[32]

2. *Courts in the 1970s Shifted to Agency Principles of Liability*

In 1972, Congress granted the EEOC the ability to file suit in federal court after conciliation efforts failed.[33] However, the EEOC faced two internal problems that diminished its ability to carry out Congress' will: (1) logistical impediments from being severely underfunded and understaffed[34] and (2) ideological impediments from being plagued by some of its own internal prejudices towards protected classes. These hurdles forty years ago helped shape the current theories of employer liability applied by the courts today. For instance, the EEOC in its early years often ignored complaints by female litigants alleging sexual harassment because the agency considered them meritless.[35] As a result, female litigants by-passed EEOC involvement and began flocking directly to the courts instead.[36]

Also, for the first time Title VII claimants alleged that employers were responsible for the misconduct of their employees, and courts responded by applying a vicarious model of liability to employers.[37] However, courts began to diverge drastically on which actions would impute employer liability, falling into three basic categories.[38] Some courts

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[29] *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–66 (1986) (analyzing the evolution of hostile workplace claims).
[30] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768–69 (1998) (Thomas, J., dissenting) (citing cases).
[31] *Id.*
[32] Sperino, *supra* note 26, at 777.
[33] 42 U.S.C. § 2000e-5(f)(1) (2012).
[34] Nathan C. Sprague, *Is the Honeymoon Over? The Fate of the EEOC and the Early Right-to-Sue Letter*, 39 WASHBURN L.J. 572, 576 (2000).
[35] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 290 (2009).
[36] *Id.*
[37] Sperino, *supra* note 26.
[38] Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997).

liberally held employers liable even for isolated acts of discrimination.[39] Others held employers liable only if the employer was either unaware of the harassment or failed to correct it once the harassment did occur.[40] Still, others only held employers liable if their corporate policies sanctioned such harassment.[41] Mainly, though, federal and state courts during this period injected an agency theory of liability into their Title VII analyses.

3. *The Court in the 1980s Blesses the Agency Theory*

As the lower courts modified their liability approaches, the Supreme Court finally turned its attention to workplace discrimination. In its first related case, the Court held that sexual harassment was an actionable claim under Title VII.[42] In another case, the Court held that an employer could not be vicariously liable for an agent's misconduct when those actions clearly opposed an employer's good faith efforts to comply with Title VII.[43] Thus, although the Court anointed the vicarious liability standard, it remained silent on the issue of whether an employee using his position of authority created employer liability.[44]

B. *The Court Ties Liability to Supervisory Status*

Eventually, the Court answered this open question when it decided the twin cases of *Burlington Industries, Inc. v. Ellerth*[45] and *Faragher v. City of Boca Raton*.[46] In creating the "*Ellerth/Faragher* framework," the Court incorporated the evolving theories of agency law that had developed in the lower courts for the past three decades. Under the *Ellerth/Faragher* framework, an employer is vicariously liable for a hostile work environment if the harassing employee was a supervisor who could take tangible employment action against the victim.[47] If the employee was not a supervisor, the plaintiff's claim proceeded under a negligence standard.[48]

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[39] *See, e.g.*, Compston v. Borden, Inc., 424 F. Supp. 157, 159–60 (S.D. Ohio 1976) (holding an employer liable for a supervisor's racial slurs against an employee).
[40] *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977) ("[S]hould a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII.") (footnotes omitted).
[41] *See, e.g.*, Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1191 (E.D. Pa. 1977) (relieving an employer of liability for an employee's unwanted sexual advances towards a co-worker because the employer had a policy against co-workers dating).
[42] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).
[43] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999).
[44] *See id.*
[45] 524 U.S. 742 (1998).
[46] 524 U.S. 775 (1998).
[47] *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2441 (2013).
[48] *Id.*

1. *An Overview of* Ellerth *and* Faragher, *and the Court's Inductive Reasoning*

Ellerth and *Faragher* both involved sexual harassment claims by female employees against their immediate bosses.[49] At the outset, the Court acknowledged that employers were typically not liable for the acts of their agents when those actions were taken outside the scope of one's employment.[50] Aware that the workplace had evolved to a point where no employer actually authorized workplace harassment any more, though, the Court applied an agency law exception that imputed liability when the agent "aided in accomplishing the tort by the *existence* of the agency relation."[51]

The Court reasoned that the employees most likely to abuse their status within the company were supervisors who could take "tangible employment action"[52] against an employee, which the Court further defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[53] That is, when a supervisor took a tangible employment action against an employee, the plaintiff's injury could not have resulted but-for the supervisor's status of authority given to him by the employer.[54] Furthermore, tangible employment actions were often official company acts recorded in an employer's business logs and subject to review by higher-level management.[55]

2. *The* Ellerth/Faragher *Framework*

Thus, in those situations where the supervisor took tangible employment action, the Court found it appropriate to apply strict liability.[56] But when a supervisor's harassment was not the result of a tangible employment action, the employer would still be vicariously liable if it could not establish an affirmative defense.[57] Specifically, an employer could avoid liability if: (1) it exercised reasonable care to prevent or correct harassment; or (2) the victim failed to avail himself of the employer's

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[49] *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.
[50] *See Faragher*, 524 U.S. at 793.
[51] *Id.* at 802–03 (citing 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)) (emphasis added). The Restatement (Third) of Agency has since discarded this exception, explaining that the exception is often already satisfied by modern theories of apparent authority and the duty of care. *See* 2 RESTATEMENT (THIRD) OF AGENCY § 7.08 (2005).
[52] *Ellerth*, 524 U.S. at 761–62.
[53] *Faragher*, 524 U.S. at 790.
[54] *Ellerth*, 524 U.S. at 761–62.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 763; *Faragher*, 524 U.S. at 803–05.

preventive or corrective opportunities.[58] Where the harassing employee was not a supervisor, the Court would simply apply the negligence standard.[59] Although *Ellerth* and *Faragher* involved sexual harassment claims, courts applied the framework to race-based claims with equal force.[60]

3. *The Rift Between Judicial and Agency Interpretation after* Ellerth *and* Faragher

The *Ellerth/Faragher* framework represented a compromise between the agency principles of vicarious liability and Title VII's policy that employers should be responsible for mitigating and preventing workplace harassment.[61] However, the Court overlooked one key point: who was a supervisor? In the wake of the *Ellerth* and *Faragher* decisions, the EEOC construed the term supervisor broadly, advocating for an approach that tied supervisory status to an employee's ability to impact another employee's daily work.[62] Specifically, it classified a supervisor as any employee who was authorized to: (1) "undertake or recommend tangible employment decisions affecting the employee," including "hiring, firing, promoting, demoting, and reassigning the employee;" or (2) "direct the employee's daily work activities."[63] In devising this definition of supervisor, the EEOC adopted the terminology found in *Ellerth* and *Faragher*, but broadened its scope by incorporating common workplace perceptions of manager responsibilities during a normal work day. While several courts adopted this broad approach,[64] others discarded the second form of supervisory status as being overly broad.[65] Thus, the Court in *Vance* sought to resolve this circuit split.

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[58] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
[59] *Faragher*, 524 U.S. at 807.
[60] *See, e.g.*, Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 n.9 (4th Cir. 2001) (citing cases reflecting "the developing consensus is that . . . [*Ellerth* and *Faragher*] apply with equal force to other types of harassment claims under Title VII"). In applying the *Ellerth/Faragher* framework to *Vance*, discussion *infra*, the Court has arguably acquiesced to this extension in judicial interpretation.
[61] *See Ellerth*, 524 U.S. at 764.
[62] EEOC, Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7651 (2003) [hereinafter EEOC Guidance].
[63] *Id.* at 405:7654.
[64] *See, e.g.*, Whitten v. Fred's, Inc., 601 F.3d 231, 245–47 (4th Cir. 2010); Mack v. Otis Elevator Co., 326 F.3d 116, 126–27 (2d Cir. 2003).
[65] *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 96 (1st Cir. 2005); Weyers v. Lear Operations Corp., 359 F.3d 1049, 1057 (8th Cir. 2004); Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033–34 n.1 (7th Cir. 1998).
[66] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.* at 276 (O'Connor, J., concurring in judgment).
[67] 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

C. *Title VII's Anti-Retaliation Provision*

While the Court was developing its employer liability theories for employee harassment, it also struggled to interpret Title VII's anti-retaliation provisions.[66] There are two types of wrongful employer conduct that rely on causation standards. The first is status-based discrimination, which prohibits employer discrimination against a protected class in hiring, firing, salary structure and the like.[67] The second involves remedy-based discrimination, which makes it unlawful for an employer to discriminate against an employee "*because* he has opposed any [prohibited employer conduct] or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [regarding employer discrimination]."[68]

The Court's leading case interpreting these provisions before the 2012 Term was fractured and highly criticized. In *Price Waterhouse v. Hopkins*, a cobbled-together group of six Justices agreed that a plaintiff could bring a status-based discrimination claim if he proved that status in a protected group was a "motivating" or "substantial" factor in the employer's decision (the motivating factor standard).[69] If the plaintiff did so, the burden of proof shifted to the employer, who could defend its action by showing that it would have engaged in the same action towards other employees not in the protected class—that is, that its discrimination was not the but-for cause of the action towards the employee (the burden-shifting standard).[70] In the 1991 Act amendments, Congress codified the motivating-factor standard, adding a provision to section 2000e-2 which stated: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[71] Congress then abrogated the burden-shifting standard.[72] However, Congress did not amend the "because of" language or causation standard for remedy-based discrimination.[73]

The Court in *Nassar* was faced with this issue of whether the motivating-factor standard for status-based claims also applied to remedy-based discrimination claims.[74] The Court had only faced this predicament in the Civil Rights Act's cousin, the Age Discrimination in Employment Act

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[68] *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.* at 276 (O'Connor, J., concurring in judgment).
[69] *Id.* at 258 (1989) (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.* at 276 (O'Connor, J., concurring in judgment).
[70] *Id.* at 258 (plurality opinion); *id.* at 259–60 (White, J., concurring in judgment); *id.* at 276–77 (O'Connor, J., concurring in judgment).
[71] 42 U.S.C. § 2000e-2.
[72] *See id.* § 2000e-5(g)(2)(B).
[73] *Id.* § 2000e-2(m).
[74] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522 (2013).

of 1967 (ADEA), which had a similar structure.[75] In that case, *Gross v. FBL Financial Services*, the Court held that the ADEA required but-for causation to state a claim of discrimination.[76] The *Gross* Court reasoned that the ordinary meaning of "because of" had traditionally meant but-for causation and noted that the ADEA must be "read . . . the way Congress wrote it."[77] The *Gross* Court also gave effect to Congress' failure to add a provision codifying the motivating-factor standard in the ADEA.[78] Because Congress had made other significant changes to the ADEA through the 1991 Act, the *Gross* Court considered the absence of a provision codifying the motivating-factor standard a purposeful omission.[79]

The EEOC, on the other hand, disagreed with this interpretive technique. Instead, it also construed remedy-based discrimination under the broader motivating-factor standard, reasoning that "an interpretation . . . that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism."[80]

IV. THE COURT ADOPTS NARROW INTERPRETATIONS IN *VANCE* AND *NASSAR*

A. Vance v. Ball State University

1. *Background*

Maetta Vance, an African-American woman, worked as a catering assistant for Ball State University (BSU) alongside Saundra Davis, a white employee.[81] Vance believed Davis was harassing her on the job, so she lodged complaints with BSU and the EEOC, alleging racial discrimination.[82] When the problem was not resolved internally, Vance filed suit in federal court.[83] Her main allegation was that BSU had created a racially hostile work environment by allowing Davis to continue serving as her supervisor, although she conceded that BSU did not authorize Vance to take tangible employment actions towards Davis.[84] The district court

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[75] 29 U.S.C. § 623 (2012).
[76] 557 U.S. 167, 180 (2009).
[77] *Id.* at 176, 179; *see also* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265–66 (1992) (defining "by reason of" as the "'but-for' cause" under the treble damages provision of RICO).
[78] *Gross*, 557 U.S. at 174.
[79] *Id.*
[80] EEOC, Directives Transmittal No. 915.003, EEOC Compliance Manual § 8-II(1) (2003).
[81] Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013).
[82] *Id.* Specifically, Vance alleged that Davis often glared at her, slammed pots around her and blocked her from using the elevator with Davis' catering cart. *Id.*
[83] *Id.*
[84] Complaint at 5–6, Vance v. Ball State Univ., No. 1:06-cv-01452-SEB-TAB (S.D. Ind., Oct. 3, 2006).

granted summary judgment in favor of BSU, noting that Davis was not Vance's supervisor under the Seventh Circuit Court of Appeals' narrow interpretation,[85] and the Seventh Circuit affirmed.[86]

2. *The Court Adopts a Narrow Definition of Supervisor*

The Supreme Court affirmed the Seventh Circuit, holding that an employee is a "supervisor" for Title VII vicarious liability purposes only if the employee was authorized to take tangible employment actions against other employees.[87] In doing so, the Court established a bright-line definition of supervisor that rejected the EEOC's broad interpretation that included employees who oversaw co-workers' daily work activities at various times. Writing for the majority, Justice Samuel Alito remarked, "[T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers."[88] To hold otherwise, Alito reasoned, would create two categories: supervisors that have the ability to take tangible employment action and supervisors that lack tangible employment action ability yet still impute vicarious liability to employers simply because they direct co-workers in their daily work routines.[89] Although co-workers can inflict psychological and physical injuries on other employees, only a supervisor can cause direct economic harm through tangible employment actions.[90] Thus, "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."[91] This ability to take tangible employment actions classifies one as a supervisor.[92]

Alito determined that the lower courts' confusion of the meaning of "supervisor" came from competing dictionary definitions[93] and the EEOC's definition that burdened employers with very divergent levels of liability.[94] This contradicted other federal statutes that characterized the supervisory status narrowly.[95] Alito chided the EEOC for advocating a position that

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[85] Vance v. Ball State Univ., 2008 WL 4247836, at *1 (S.D. Ind., Sept. 10, 2008).
[86] Vance v. Ball State Univ., 646 F.3d 461, 475 (7th Cir. 2011).
[87] *Vance*, 133 S. Ct. at 2439.
[88] *Id.* at 2443.
[89] *Id.*
[90] *Id.* at 2448.
[91] *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998)) (internal quotations marks omitted).
[92] *Id.*
[93] *Id.* at 2444 (comparing 17 OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989) (defining "supervisor" liberally as "one who inspects and directs the work of others") with WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2296, def. 1(a) (1976) (defining "supervisor" conservatively as "a person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action")).
[94] *Vance*, 133 S. Ct. at 2444.
[95] *Id.* (citing 25 U.S.C. § 2021(18) (2012) (defining "supervisor" under the Bureau of Indian Affairs' classification as "the individual in the position of ultimate authority")).

caused lower courts to engage in highly case-specific inquiries.[96] Indeed, nothing in *Ellerth* or *Faragher* even suggested the Court construed supervisory status broadly.[97]

Alito then explained how the decision squared with the modern realities of the workplace. Specifically, the interpretation provided a bright-line test that could be easily applied to summary judgment, trial stages and jury instructions.[98] The EEOC's broad standard, on the other hand, would require examination of "nebulous" factors, such as: what constitutes "sufficient authority"; what weight should be given to retaliatory acts; and how often the employee exercised supervisory authority.[99] This would force employers to walk a tight rope to avoid liability because it is nearly impossible for an employer to determine those factors beforehand.[100]

Applying this narrow definition of supervisor, the Court held that Davis' duties at BSU were insufficient to make her Vance's supervisor.[101] Davis could not fire, demote, assign daily tasks or take any other tangible employment action that could cause have caused Vance direct economic harm.[102] Therefore, BSU was not vicariously liable for Davis' actions.[103]

3. *The Four Dissenters*

Ginsburg's dissent, joined by three other Justices, was unabashedly frank in calling on Congress to abrogate the majority's decision. Ginsburg accused the majority of neglecting the "all-too-plain reality" that employees with the ability to control other workers sometimes use their position of authority to create a hostile workplace.[104] She opined, "The limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[105] As a defiant Ginsburg explained:

> Exposed to a fellow employee's harassment, one can walk away or tell the offender to "buzz off." A supervisor's

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[96] *Vance*, 133 S. Ct. at 2443.
[97] *Id.* at 2446.
[98] *Id.* at 2444, 2449 ("In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery."). *See also id.* at 2454 (Thomas, J., concurring) ("I join the opinion because [the Court's definition of supervisor"] provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment.") (internal citations omitted).
[99] *Id.* at 2443.
[100] *Id.* at 2450.
[101] *Id.* at 2454.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 2458–59 (Ginsburg, J., dissenting).
[105] *Id.* at 2455.

> slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive to her family life. And she may be demoted or fired. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose "power and authority invests his or her harassing conduct with a particular threatening character."[106]

Ginsburg would have given deference to the EEOC's broad interpretation and argued that the majority's interpretation was out of synch with modern agency theories.[107] Ginsburg contended: "In so restricting the definition of supervisor, the Court once again shuts from sight the 'robust protection against workplace discrimination Congress intended Title VII to secure.'"[108] Concluding her dissent, Ginsburg called on Congress to intervene to correct the Court's interpretation like it has been prone to do with civil rights legislation.[109]

B. University of Texas Southwestern Medical Center v. Nassar

1. *Background*

The University of Texas Southwestern Medical Center (Texas Southwestern) was affiliated with a number of healthcare facilities, including Parkland Memorial Hospital (Parkland).[110] Under an affiliation agreement, Parkland agreed to offer empty staff positions to Texas Southwestern's faculty members; as a result, Texas Southwestern's faculty filled most of Parkland's staff positions.[111] Naiel Nassar was an Egyptian-born, Muslim doctor specializing in internal medicine and infectious diseases at Texas Southwestern while also serving as a physician at Parkland.[112] Texas Southwestern's Chief of Infectious Disease Medicine, Dr. Beth Levine, was hired afterwards as Nassar's superior.[113] Nassar believed Levine was discriminating against him because of his religion and

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[106] *Id.* at 2456 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998)).
[107] *Id.* at 2457.
[108] *Id.* at 2462 (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting)).
[109] *Id.* at 2466.
[110] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).
[111] *Id.*
[112] *Id.*
[113] *Id.*

national origin, so he complained to Levine's supervisor, Dr. Gregory Fitz.[114]

While trying to negotiate an arrangement where he could continue working at Parkland without teaching at Texas Southwestern, Nassar resigned from Texas Southwestern, citing Levine's "religious, racial and cultural bias against Arabs and Muslims."[115] Fitz defended Levine, arguing she had been publicly humiliated and deserved a public apology from Nassar.[116] When Fitz learned that Parkland had offered Nassar a staff physician job, Fitz intervened and Parkland withdrew its offer.[117] Nassar filed suit in federal court, alleging status-based discrimination for Levine's harassment, as well as retaliation-based harassment by Fitz.[118] The district court awarded Nassar over $400,000 in back pay and $300,000 in compensatory damages,[119] and the Court of Appeals for the Fifth Circuit affirmed the retaliation findings, holding that EEOC's motivating factor standard was sufficient to prove retaliation.[120]

2. *The Court Adopts the But-For Causation Standard for Remedy-Based Retaliation Claims*

Writing for the majority, Justice Kennedy noted that Congress often wrote statutes under the backdrop of common law principles of but-for causation.[121] In discussing Congress' legisprudence, Kennedy stated, "This [] is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself."[122] Kennedy also offered two insights the *Gross* Court discussed: one regarding the proper textual interpretation of "because" for causation purposes and another regarding Congress' "structural choices in both Title VII itself and the law's 1991 amendments."[123] Because of Congress' failure to define the causation standard, Kennedy surmised that the provision warranted the same prevailing legal standard that existed at the time the Civil Rights Act was passed.[124] Specifically, when Congress passed the Civil Rights Act,

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[114] *Id.* For example, Nassar alleged that Levine singled him out for his billing methods and made derogatory comments about Middle Easterners. *Id.*
[115] *Id.* at 2523–24.
[116] *Id.* at 2524.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* (citing to Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 n.16 (5th Cir. 2012) (citing Smith v. Xerox Corp., 602 F.3d 320, 330 (5th Cir. 2010)).
[121] *Id.*
[122] *Id.* at 2533.
[123] *Id.* at 2527–28.
[124] *Id.* at 2528.

causation existed under a but-for standard.[125] Therefore, the Court refused to apply the motivating-factor standard to remedy-based retaliation.[126]

Kennedy also focused on the deliberate structure of Title VII and its pattern of defining specific terms in many of its provisions. He reasoned, "In light of Congress' special care in drawing so precise a statutory scheme, it would be improper to indulge [Nassar's] suggestion that Congress meant to incorporate the default rules that apply only when Congress writes a broad and undifferentiated statute."[127] Kennedy also employed a whole code interpretive canon by referencing the Americans with Disabilities Act of 1990—passed a year before § 2000e-2(m)—which included an express anti-retaliation provision detailing the applicable causation standard.[128] This bolstered Kennedy's argument that Congress' failure to revise Title VII's anti-retaliation provision was intentional.[129]

Finally, Kennedy discussed the practical effect of the majority's narrow reading: the decision would limit the filing of frivolous claims, "which would siphon resources from efforts by employers . . . to combat workplace harassment."[130] He imagined a scenario where an employee, knowing he or she would be fired or demoted, would file a status-based discrimination claim with the EEOC.[131] Then, when the employee actually was fired or demoted, the employee would claim remedy-based retaliation.[132] Under the motivating-factor standard, Kennedy believed, this could unduly increase settlement or trial costs.[133] It would also smear the reputation of an employer whose actions did not actually stem from discriminatory intent.[134] Ultimately, the Court vacated the Fifth Circuit's decision and remanded it so the lower court could decide whether Fitz's intervention was the but-for cause of Nassar's Parkland offer being rescinded.[135]

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[125] *Id.*
[126] *Id.* ("Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope.").
[127] *Id.* at 2530–31 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) (distinguishing Title IX's broadly worded provisions regarding discrimination from Title VII's finely tailored provisions)).
[128] *Id.* at 2526. *See generally* 42 U.S.C. § 12112 (2012).
[129] *Nassar*, 133 S. Ct. at 2531 ("Congress has in explicit terms altered the standard of causation for one class of claims but not another, despite the obvious opportunity to do so in the 1991 Act.").
[130] *Id.* at 2531–32.
[131] *Id.* at 2532.
[132] *Id.*
[133] *Id.* (comparing Vance v. Ball State Univ., 133 S. Ct. 2434, 2443–45 (2013)).
[134] *Id.* at 2532.
[135] *Id.* at 2534.

3. *The Four Dissenters*

Ginsburg criticized Kennedy's approach, claiming it divorced the concepts of status-based discrimination and retaliation.[136] Noting that "the fear of retaliation is the leading reason why people stay silent" about workplace discrimination, Ginsburg argued that discrimination encompassed forms of retaliation.[137] The Court's decision, Ginsburg argued, would confuse judges and jurors who will have to apply different standards to seemingly similar provisions since "because of" has two different meanings in the same statute.[138]

Ginsburg also argued that the decision undermined the congressional intent behind the 1991 Act.[139] She stated, "There is scant reason to think that, despite Congress' aim to restore and strengthen . . . laws that ban discrimination in employment Congress meant to exclude retaliation claims from the newly enacted motivating factor provision."[140] Instead, Ginsburg would have given deference to the EEOC's position and applied the motivating-factor test to remedy-based discrimination.[141] She concluded her dissent by calling on Congress to abrogate the decision in the same way she wanted Congress to overturn *Vance*.[142]

V. *VANCE* AND *NASSAR*'S IMPACT ON SMALL BUSINESSES

A. *Small Business Aspects Overlooked by Congress and the Courts*

Although Title VII produced great results in bringing equality to the workplace, it was not meant to inhibit commerce through overly complex regulatory structures. Specifically, Title VII neither imposes a "general civility code"[143] nor protects against the "ordinary tribulations of the workplace"[144] like isolated abusive language. Instead, Title VII focuses on avoiding harm rather than providing redress,[145] and the Court has routinely held that employers must be able to conduct business without worrying that a slight miscue will crush them under the full weight of Title

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[136] *Id.* at 2537 (Ginsburg, J., dissenting).
[137] *Id.* at 2534–35 (quoting Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279 (2009)) (internal quotations omitted).
[138] *Id.* at 2535.
[139] *Id.* at 2546 ("It is an odd mode of statutory interpretation that divines Congress' aim in 1991 by looking to a decision of this Court, *Gross*, made under a different statute in 2008, while ignoring the overarching purpose of the Congress that enacted the 1991 Civil Rights Act.").
[140] *Id.* at 2539 (citations omitted) (internal quotations omitted).
[141] *Id.* at 2540 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
[142] *Id.* at 2547.
[143] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).
[144] BARBARA LINDEMANN & DAVID KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992).
[145] Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (citations omitted).

VII.[146] Even courts before *Ellerth* and *Faragher* were cognizant that it would be improper to hold companies liable for the actions of low-level managers because of functional nomenclature.[147] Nevertheless, Title VII is the most litigated portion of the Civil Rights Act,[148] and Congress and the Court often devise legal standards without considering the burden on small businesses.[149] This divide ignores the modern realities of the small business community,[150] though, because it does not consider unique small business aspects like workplace hierarchies and market constraints. As a result, the discord between legisprudence and jurisprudence places a substantially greater burden on small businesses than large corporations.

1. *Workplace Hierarchies in Small Businesses*

Workplace hierarchies vary widely across the country and between industries, and small businesses have trended more towards autonomous teams comprised of "quasioverseer" employees.[151] As a result, the only supervisor with the ability to take tangible employment actions in a small business is usually the owner himself.[152] According to a National Federation of Independent Business study, sixty-two percent of small business employees have occasionally exercised supervisory authority under the EEOC's broad definition, but those same employees were never able to exercise tangible employment action against co-workers.[153] Thus, the EEOC's broad definition had christened the majority of small business employees as supervisors.

Furthermore, small businesses often utilize non-linear management structures to allow more flexibility with employee schedules.[154] Small businesses typically have an ordinary employee cover for a manager on duty when that person goes on break.[155] However, this covering employee is never endowed with the ability to take tangible employment action.[156] Other times, employees may be paid slightly more than other co-workers for reasons unrelated to job responsibilities, like seniority.[157] This increased

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[146] *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21–22 (1993) (holding that "harassing behavior" need not force the victim to leave his or her job, but it cannot be so attenuated that it causes no identifiable harm. The harassing behavior must be of such severity or pervasiveness that it pollutes the workplace, thereby "alter[ing] the conditions of the victim's employment").
[147] *See, e.g.*, Saxton v. AT&T, 10 F.3d 526, 536 (7th Cir. 1993).
[148] ESKRIDGE ET AL., *supra* note 8, at 38.
[149] Brief for Nat'l Fed'n Indep. Bus. Small Bus. Legal Ctr. et al. as Amici Curiae Supporting Respondent, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 5353863, at 7 [hereinafter NFIB Brief].
[150] *See id.*
[151] *Id.*
[152] *Id.*
[153] NFIB, *Business Structure*, 4 NAT'L SMALL BUS. POLL 6 (2004).
[154] NFIB Brief, *supra* note 149, at 7.
[155] NFIB, *supra* note 153.
[156] *Id.*
[157] NFIB Brief, *supra* note 149, at 11.

pay is meant to incentivize experienced employees to stay with the small business, not necessarily to reward them for having a greater grant of authority from an employer. Under the EEOC's broad definition of supervisor, every employee in these situations would be at risk of being considered a supervisor and would increase employer liability costs.[158] If small businesses were not sure who qualified as a supervisor, they would potentially spread their limited resources over a wider range than necessary to create supervisor training programs. This would ultimately result in less effective screening, training and monitoring of these employees because comprehensive training modules are more difficult to develop and properly administer when they must be given to a larger set.[159] This type of legal indeterminacy only obstructs small business planning.

2. *Market Constraints on Small Businesses*

Due to their insular positions in the capital markets, small businesses also face greater difficulties restructuring compliance initiatives to comport with shifting legal regimes. Generally speaking, employers need confidence that judicial decisions will remain intact for a significant periods of time. Yet only twelve percent of small businesses have at least one employee whose sole duty is to handle compliance or human resources developments when the law changes.[160]

Moreover, small businesses often lack the resources enjoyed by large corporations to "parse the language of complicated legal standards before making decisions that could expose them to significant liability."[161] A corollary of this concern for resource preservation is that small businesses often rely on the plain meaning of statutes and settled law when determining how a statute will apply to them, especially if they cannot afford outside counsel to advise them on how a law may be interpreted. This reliance arises from the presumption that courts will infer Congress uses terms that have accumulated settled meaning in the law and that Congress meant to incorporate these understandings in a statute.[162] Large corporations, on the other hand, benefit from economies of scale and have better access to additional capital than small businesses. Large businesses may reallocate funds from marketing, research or technology, but small businesses may only have the option of raising prices on consumers to cover increased litigation costs.

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[158] *See id.* at 8.
[159] Brief for Chamber of Commerce of the U.S. as Amici Curiae Supporting Respondent, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 5361524, at *10 [hereinafter Chamber of Commerce Vance Brief].
[160] NFIB, *supra* note 153.
[161] NFIB Brief, *supra* note 149, at 2.
[162] NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981); *see also* Meyer v. Holley, 537 U.S. 280, 285 (2003) ("[T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.").

Also, small businesses often lack the resources necessary to meet their litigation needs, so when a lawsuit is filed against them, it may cost small businesses more to defend a claim than to simply settle outside of court.[163] It costs employers between $4000 and $10,000 to comply with an EEOC investigation, at least $75,000 to defend a claim on summary judgment, and between $125,000 and $500,000 to litigate a case before a jury.[164] As a result, even if a claimant brings a frivolous claim, small businesses may feel forced to pay more to settle to avoid additional costs associated with litigation and attorney fees. This is especially true given the increase in the frequency of retaliation charges in recent years, despite the fact the EEOC itself has determined many are without merit.[165] In 2012 alone, the EEOC determined there was reasonable cause in only 1,800 of the charges filed with it.[166] By contrast, the EEOC determined that 27,077 charges lacked reasonable cause.[167] Thus, only six percent of the retaliation claims brought before the EEOC exhibited some good-faith foundation for retaliation. If the litigants bypass EEOC intervention, employers must still face increased litigation costs to defend against the charges.[168] This places an even greater burden on small businesses struggling after the 2008 financial crisis.[169] Ultimately, the narrow approaches from *Vance* and *Nassar* benefit small businesses because they lead to objective interpretation and involve facts that were immutable at the time of the alleged harassment.[170]

B. *Benefits that Will Inhere to Small Businesses from the* Vance *and* Nassar *Rulings*

The threat of vicarious liability causes employers to use their limited resources to enact preventive policies relating to the employees who have the greatest potential to abuse their authority: supervisors.[171] By encouraging employers to focus their preventive efforts on a smaller subsection of employees, *Vance*'s narrow definition of supervisor promotes

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[163] STEPHEN C. YEAZELL, CIVIL PROCEDURE 878, 880 (8th ed. 2012) (discussing this concept in the context of mass tort claims).
[164] David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research,* 57 STAN. L. REV. 1557, 1579 (2005) (footnote omitted).
[165] Chamber of Commerce Vance Brief, *supra* note 159, at *11–12 .
[166] *Id.* at *17.
[167] *Id.*
[168] *Id.* at *18.
[169] *Id.*
[170] *See* Antonin Scalia, *Common-law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 7 (1998) (arguing that abandoning principles of stare decisis jeopardizes consistent application of the law to all parties).
[171] Chamber of Commerce Vance Brief, *supra* note 159, at *5.

avoidance of harassment liability by efficiently allocating resources.[172] Because "employers have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance," employers have "a greater opportunity to guard against misconduct by supervisors than by common workers."[173] Under *Vance*'s interpretation of supervisor, small businesses can estimate their prospective liability based off an employee's ability to take tangible employment actions, not whether that individual happens to direct a co-worker on a particular day. Merely allowing an employee to direct a co-worker's activities will not upgrade an employee to supervisory status.[174] As the law stands, an employer will have to vest an employee with plenary authority to take tangible employment actions in order to subject itself to increased liability. Furthermore, under the *Vance* regime, supervisory status will now be determined as a matter of law before trial commences.[175] The *Vance* approach also prevents employees from arguing that an individual was a supervisor one day, but a regular co-worker the next, which squares with the Court's original reasoning in *Ellerth* that "supervisory harassment cases involve misuse of actual power, not the false impression of its existence."[176]

Under *Nassar*'s but-for causation standard for retaliation, an employer has an easier time showing that other factors led to an adverse employment action against an employee. Retaliation claims have nearly doubled in the past fifteen years, from approximately 16,000 claims filed in 1997, to over 31,000 in 2012.[177] In fact, only status-based claims dealing with race are filed more often,[178] but Title VII litigants often allege discrimination and retaliation simultaneously.[179] Before *Nassar*, instead of plaintiffs proving discrimination, employers had to prove a negative: that they did not discriminate against the employee.[180] Under the motivating-factor standard, even when an employer fired an employee for nondiscriminatory reasons, an employee could still prevail simply by showing the decision was slightly motivated by retaliation.[181] Under

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[172] *See* Jodi R. Mandell, Mack v. Otis Elevator*: Creating More Supervisors and More Vicarious Liability for Workplace Harassment*, 79 ST. JOHN'S L. REV. 521, 549 (2005).
[173] Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).
[174] *See* Andonissamy v. Hewlett-Packard Co., 547 F.3d 841, 848 (7th Cir. 2008).
[175] Mark Phillis & Denise Visconti, *The Supreme Court Clarifies Who Is A Supervisor Under Title VII*, LITTLER MENDELSON (June 25, 2013), http://www.littler.com/publication-press/publication/supreme-court-clarifies-who-supervisor-under-title-vii.
[176] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 744 (1998).
[177] *Charge Statistics FY 1997 Through FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited April 17, 2014).
[178] *Id.*
[179] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2535 (2013) (Ginsburg, J., dissenting).
[180] Chamber of Commerce Brief, *supra* note 165, at 11–12.
[181] *Id.* at 13.

Nassar, judges will now have clearer standards before sending cases to juries.[182] This reduces the possibility that a jury could find against an employer, and studies have suggested that juries are more sympathetic to employers in discrimination cases than in retaliation cases.[183] Indeed, juries have sometimes exonerated employers from discrimination charges, only to find against the employer on retaliation grounds.[184]

Both cases aid employers when it comes to crafting a strategy to limit their exposure to workplace liability. Under *Vance*, an employer can minimize its potential liability by simply limiting the number of employees it authorizes to take tangible employment actions. Under *Nassar*, it is much easier for an employer to present evidence that discrimination was not the but-for cause of the employee's termination instead of simply a motivating factor.[185] The practical effect of these narrow, textualist interpretations is that it favors employers. Specifically, the clear standards set out in *Vance* and *Nassar* also allow small businesses to devote fewer resources to their legal departments, making the decisions wins for employers. The twin decisions will ultimately reduce these costs placed on small businesses faced with combatting discrimination claims and will reduce settlement values across the board.[186]

VI. ADVICE FOR SMALL BUSINESS COUNSEL

Even though the *Vance* and *Nassar* decisions are employer-friendly rulings, small business counsel must remain proactive to protect their clients' interests. Title VII still encourages employers to craft effective anti-harassment policies and grievance mechanisms by threatening them with liability if they are negligent in detecting workplace harassment.[187] Harassment victims may still seek a remedy for discrimination, albeit with a higher burden. As *Vance* made clear, applying the negligence framework of liability for non-supervisors provides a sufficient model to evaluate employer liability without saturating businesses with litigation costs.[188]

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[182] Kevin Russell, *Court Rules for Employers in Two Employment Discrimination Cases*, SCOTUSBLOG (June 24, 2013, 3:44 PM), http://www.scotusblog.com/2013/06/court-rules-for-employers-in-two-employment-discrimination-cases/.

[183] Abigail Caplovitz Field, *Responding to Retaliation Suits After* Vance *and* Nassar, CORP. SECRETARY (Sept. 16, 2013), http://www.corporatesecretary.com/articles/regulation-and-legal/12533/responding-retaliation-lawsuits-after-vance-and-nassar/.

[184] *Id.*

[185] Jon D. Bible, *Keeping Current:* Nassar *and* Vance*: Supreme Court Limits Scope of Title VII of the 1964 Civil Rights Act*, BUS. L. TODAY (Sept. 2013), http://www.americanbar.org/content/dam/aba/publications/blt/2013/09/full-issue-201309.authcheckdam.pdf.

[186] Russell, *supra* note 182.

[187] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759, 764 (1998).

[188] Vance v. Ball State Univ., 133 S. Ct. 2434, 2448 (2013); *see also* Mandell, *supra* note 172, at 552 ("[T]he [] definition seems to strike a balance between

Evidence that an employer did not prevent foreseeable harassment situations, failed to respond to discrimination allegations or did not provide an adequate grievance filing mechanism could still impart liability on small businesses.[189] In fact, plaintiffs were still able to obtain relief in the circuits that applied the Court's narrow definitions of supervisor and retaliation.[190]

Small business counsel therefore should advise clients to maintain robust antidiscrimination policies and to regularly educate employees on workplace harassment awareness. In fact, some states require employers to provide harassment training to employees.[191] Even if these are not required by law, these techniques can often aid an employer in winning dismissal of a discrimination or retaliation claim in court.[192] Some procedures small business counsel should advise their clients to take are:

(1) *Insert arbitration clauses into employment contracts.* Small businesses benefit greatly from the ability to arbitrate claims, and mandatory arbitration clauses are generally enforceable.[193] Arbitration saves small businesses valuable litigation resources because it requires fewer pretrial procedures and limits discovery.[194] Arbitration also allows a small business to safeguard its reputation[195] by requiring that settlement terms remain confidential.[196] Overall, inserting mandatory arbitration clauses into employment contracts allows small businesses to maintain control over contractual disputes.[197]

(2) *Review employee job descriptions.* Small business entrepreneurs should review their job descriptions for managers and other employees who may occasionally oversee the work of others in the company. Position descriptions should expressly delineate between an employee's ability (or

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allowing plaintiffs with strong hostile work environment claims to prevail, and limiting vicarious liability for the acts of those employees over whom the employer has sufficient control.").

[189] *Vance*, 133 S. Ct. at 2453.

[190] *See, e.g.*, EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 684 (8th Cir. 2012) (awarding plaintiff money damages while applying the definition of "supervisor" upheld in *Vance*).

[191] *See, e.g.*, ME. REV. STAT. tit. 26 § 807(3) (1991) (requiring all private or public employers with fifteen or more employees to provide mandatory sexual harassment training to all employees or supervisors within one year of starting the position).

[192] *See, e.g.*, Brinkley v. Green Bay, 392 F. Supp. 2d 1052 (E.D. Wis. 2005).

[193] *See* 9 U.S.C. § 2 (2012).

[194] Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 639–40 (2001) ("There is no doubt that arbitration is faster on the whole than court . . . . With fewer depositions and with faster pre-trial procedures, a proceeding tried to judgment is much less costly in arbitration than in court.").

[195] Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1224 (2006).

[196] Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 452 (2010).

[197] *Id.*

inability) to take tangible employment actions.[198] Evidence of employee job descriptions can mitigate factual disputes about whether an employee is a supervisor under the *Vance* interpretation of the term.[199]

(3) *Revisit anti-harassment policies.* Most employees' understanding of workplace discrimination comes not from reading about recent legal developments, but from their employers' corporate policies.[200] In fact, some scholars consider the popularity of internal corporate policies to be the most significant development in employment discrimination in the last two decades.[201] Some employers define discrimination more broadly than the legal definitions of discrimination because they have often included situations that seem like harassment to a lay person but extend beyond the legal contours of discrimination.[202] Employers take these prophylactic measures in order to minimize their liability, even if it may create an impression in employees' minds that Title VII protections are broader than the law actually allows.[203] Notwithstanding this seeming reliance, though, employees who wish to argue that their employer's policy incentivized them to report supposed misconduct often cannot use this subjective evidence in court.[204]

Additionally, anti-harassment policies play a role in cases where plaintiffs are seeking punitive damages. In order to recover punitive damages under Title VII, a claimant bears the burden of showing the employer acted with a reckless disregard towards employee rights.[205] However, employers can rebut this evidence by simply showing they have adopted anti-harassment policies and educated their employees about their Title VII protections.[206]

Furthermore, studies indicate that the EEOC is significantly less likely to find "cause" in discrimination allegations when employers have anti-harassment policies than if they do not.[207] Thus, demonstrating a visible commitment to preventing discrimination can reduce an employer's

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[198] Julia E. Judish et al., *Impact of Supreme Court Pro-Employer Title VII Decisions Blunted by State Laws*, 39 EMP. REL. L.J. (2013).
[199] *Id.*
[200] Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 116 (2014).
[201] *See id.* at 128, 131 n.94 (arguing that the propagation of employer policies was not merely a reaction to developments in employment law, but also a driving force in the law's development).
[202] Brake, *supra* note 200, at 119 ("EEO policies need not track legal nondiscrimination rights, and often merge broader promises and fairness with nondiscrimination guarantees.").
[203] Chamber of Commerce Vance Brief, *supra* note 159, at *21.
[204] Brake, *supra* note 200, at 118.
[205] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).
[206] *Id.*
[207] *See* Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOCIOLOGY 1394, 1424–25 (2008).

liability.[208] Ultimately, effective corporate policies can help small businesses establish that any perceived discrimination or retaliation was unintentional.[209]

(4) *Encourage grievance reporting.* Title VII compliance also depends upon the willingness of employers to establish effective grievance reporting protocols and the willingness of employees to file complaints and assist in investigations.[210] Small businesses should encourage employees to file grievance reports to a person higher than the co-worker who oversees their work production if they believe they are the victim of discrimination.[211] It is important that employers encourage employees to report any instances of perceived harassment in clear and precise terms.[212] Once a grievance procedure is in place, the small business must ensure that it is effectively followed, too. Having a grievance reporting procedure that is never followed increases the chances that an employee would forego internal complaint channels, thereby eroding the small business' reputation if the case goes to trial.[213]

Grievance procedures are the most rational way for employers to insulate themselves from liability.[214] Nearly ninety-five percent of employers already have grievance procedures in place for reporting harassment.[215] Most employees first attempt to negotiate with employers, but even if they do wish to lodge a formal complaint, they often do so using their employers' grievance procedures.[216] Furthermore, courts have generally offered a lower level of protection to employees who use an employer's internal channels for reporting harassment than those who lodge complaints through external channels like the EEOC.[217]

(5) *Supplement anti-harassment policies and grievance procedures with employee training programs.* Employers should have an express antidiscrimination policy and should implement this policy through various training programs. But a small business cannot simply glance over its anti-retaliation message during training sessions; it needs to be evident

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[208] C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charged Outcomes*, 42 LAW & SOC'Y REV. 239 (2008).
[209] Field, *supra* note 183.
[210] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2537 (2013) (Ginsburg, J., dissenting).
[211] Huston v. Proctor & Gamble Paper Prods. Corp., 568 F.3d 100, 108–09 (3d Cir. 2009). *See also* EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 320 (4th Cir. 2008) (holding an employer negligent in preventing harassment because it "was practicing something akin to willful blindness").
[212] Brake, *supra* note 200, at 119.
[213] Field, *supra* note 183.
[214] Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC'Y REV. 181, 190 (2004).
[215] Brake, *supra* note 200, at 131 n.94.
[216] *Id.* at 133.
[217] *Id.* at 118.

throughout the entire antidiscrimination training.[218] Generally, antidiscrimination trainings should educate employees on how to identify, report and prevent harassment.[219]

Although it may be expensive for small businesses to hold trainings for all employees every year, small businesses can utilize more cost-effective techniques such as handing out a simple reminder of the company's anti-harassment policy or sending company-wide emails.[220] The employer can also post signs around the employee break room that emphasize the importance of a harassment-free work environment.[221] Some small businesses have even begun utilizing "burst learning" by sending out short videos several times a year that remind employees of the company's values and policies.[222]

(6) *Respond promptly to discrimination allegations and comply with EEOC investigations.* Small business employers should respond to harassment complaints immediately, usually by launching an internal investigation into the matter.[223] When the investigation is underway, the employer should document all discussions about its course of action, as well as its reasoning for each action.[224] This creates a track record for the employer's benefit if it must present evidence that its decision was not the determinative factor in firing or demoting the employee—especially if the litigant lodges another complaint against an employee during this investigation period.[225] Managers should also avoid discussions with the alleged victim that could be seen as an attempt to obstruct an EEOC investigation.[226]

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[218] Field, *supra* note 183.
[219] Alan S. Gutterman, *SCO[T]US Clarification Of "Supervisor" Definition Does Not Reduce Compliance Program Requirements*, BUS. COUNSELOR BLOG (Oct. 14, 2013 11:26 AM), http://www.businesscounselorblog.com/2013/10/scous-clarification-of-supervisor-definition-does-not-reduce-compliance-program-requirements.html;
see also Brake, *supra* note 200, at 119 (explaining that many small business employees are not told their duties to report harassment).
[220] Field, *supra* note 183.
[221] Gutterman, *supra* note 219.
[222] Field, *supra* note 183.
[223] Alan S. Gutterman, *New Supreme Court Rulings Will Influence Judicial Standards Relating to Harassment Claims*, FINDLAW (July 1, 2013), http://corporate.findlaw.com/litigation-disputes/new-supreme-court-rulings-will-influence-judicial-standards-relat.html. *But see* Hardage v. CBS Broadcasting, Inc., 427 F.3d 1177 (9th Cir. 2005), *amended on denial of rehearing*, 433 F.3d 672 (9th Cir. 2006), *further amended on further denial of rehearing en banc*, 436 F.3d 1050 (9th Cir. 2006) (holding that an employer does not have to conduct an investigation when the complaint is vague and the employee indicates he can handle the situation on his own).
[224] Judish et al., *supra* note 198, at 5.
[225] *Id.*
[226] Gutterman, *supra* note 223.

While an investigation is in progress, the employer should move the complainant to another department. If that is not possible, the employer should make every attempt to have the alleged victim and alleged harasser work during different shifts.[227] Finally, the employer should refrain from simply firing the alleged offender, as this may give the alleged harasser cause to file a wrongful termination claim.[228]

(7) *Be aware of Title VII state and local analogs.* The narrower treatment of supervisor liability and retaliation protection may push some plaintiffs to seek recourse using state equivalents instead of or in addition to Title VII when the state or local law offers more favorable legal standards to employees.[229] An employee who sees his or her federal claim fail may still find relief under state law. For example, California's Title VII equivalent, the Fair Employment and Housing Act (FEHA), statutorily defines supervisory status more broadly than the *Vance* Court.[230] FEHA considers an individual a supervisor if the employee: (1) can take tangible employment actions against an employee; (2) has the authority to "assign, reward, or discipline" other employees; or (3) has been imbued with the "responsibility to direct" other employees.[231] California courts have also interpreted FEHA's overarching purpose broadly to protect an employee's right to work in a non-hostile environment.[232]

Similarly, some state and local laws have provided for a broader scope of causation in retaliation cases. The District of Columbia Human Rights Act, for instance, allows a plaintiff in a state law retaliation case to prevail simply by proving that retaliation was a motivating factor in the employer's actions, regardless of legitimate business reasons.[233] Therefore, employers should remain vigilant and not relax their corporate policies. If the small business operates solely or primarily in one jurisdiction, small business counsel should advise the employer it should consider incorporating these state law standards into its anti-harassment policies and training modules.

VII. CONCLUSION

Small businesses are acutely affected by the discord between Congress' legisprudence and the Court's jurisprudence in the Title VII

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[227] *Id.*
[228] Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims,* 61 ALB. L. REV. 627, 659 (1997) ("Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency.").
[229] Judish et al., *supra* note 198, at 4.
[230] *See id.*
[231] *Id.*
[232] *Id.* at 5.
[233] Propp v. Counterpart Int'l, 39 A.3d 856, 870 (D.C. 2012).

arena. Small businesses are often asked to bear equally the brunt of all consequences that changing legal regimes also create for large corporations despite having different workplace hierarchies and market constraints. However, two recent Title VII decisions by the Court have narrowed the scope of employer liability and are undoubtedly wins for small business employers. In *Vance*, the Court limited vicarious liability to those supervisors that are authorized to take tangible employment actions against employees. And in *Nassar*, the Court endorsed the but-for standard of causation in remedy-based retaliation claims. The combined effect of these decisions will benefit small businesses by reducing litigation costs and preventing claims from reaching juries. Nevertheless, small business owners must remain proactive in stamping out workplace hostilities by having robust anti-harassment procedures. Once small businesses are able to effectively protect their corporate assets, they can then turn their attention to more important matters: making a profit.